90-529

Supreme Court, U.S.
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NO. _____

In The
Supreme Court of the United States
October Term, 1990

RICHARD L. MILLER, PATRICIA A. MILLER, and PATRICIA A. LANTZ,

Petitioners,

v.

DONALD RICE, in his official capacity as Secretary of the United States Air Force, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September 1990

Questions Presented For Review

1. Whether the government is contractually bound to honor the survivor annuity agreements voluntarily purchased, and paid for, by military retirees.
2. Where Congress expressed the specific intent that a working wife's own earned social security old-age pension not be offset against her military survivor annuity, whether an administrative agency can apply the offset anyway on the pretext that the widow "would be entitled" to her deceased husband's social security survivor benefit if she had not earned her own pension.
3. Where Congress has defined the word "entitled" in the Social Security Act, whether an admininstrative agency can disregard that definition when applying a related statute — the calculation of a social security offset to the military retiree survivor benefit annuity — merely because the annuity statute refers to "would be entitled" rather than "is entitled."
4. Where Congress has delegated to an agency the authority to formulate policy in administering a statutory program, whether the agency's interpretation of statutory language is entitled to deference by the courts when that interpretation is inconsistent with the agency's previous interpretations of the same language.
5. Whether a limited principle of equitable estoppel should be applied against the government, not to bind the government by the act of its agents, but instead to insure that an administrative agency must construe a particular statute in a consistent manner.

Note: the masculine gender is used herein for the servicemember, with his widow as beneficiary, reflecting the situation of the named petitioners. The military's Survivor Benefit Plan applies equally to female servicemembers and their widowers.

Parties

The following is the identification of all Respondents, subject to further substitution of public officers pursuant to Rule 35.3:

Donald Rice, in his official capacity as Secretary of the United States Air Force; Richard Armitage, in his official capacity as Secretary of the United States Army; Lawrence Garrett III in his official capacity as Secretary of the United States Navy; Gwendolyn King in her official capacity as Administrator of the Social Security Administration; Samuel Knox Skinner in his official capacity as Secretary of Transportation; Richard Cheney in his official capacity as Secretary of Defense; Louis Sullivan in his official capacity as Secretary of Health and Human Services; Department of the Army; Department of the Navy; Department of the Air Force; Department of Transportation; Department of Health and Human Services.

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Opinions Below

The opinion of the Court of Appeals (App. A, pp. 13-24) is reported at 907 F. 2d 957. The Order of the United States District Court for the District of Wyoming (App. B, pp. 25-40) is reported at 700 F.Supp. 1565.

Jurisdiction

The judgment of the Court of Appeals for the Tenth Circuit was entered on June 29, 1990; this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Statutory Provisions Involved

[Survivor Benefit Plan] 10 *United States Code* § 1451 (a) (3):

(3) An annuity computed under this subsection shall be reduced by the lesser of —

(A) the amount of the survivor benefit, if any, to which the widow or widower would be entitled under title II of the Social Security Act (42 U.S.C. 401 et seq.) based solely upon service by the person concerned as described in section 210 (*l*)(1) of such Act (42 U.S.C. 410 (*l*)(1)) and calculated assuming that the person concerned lives to age 65; or

(B)[Inapplicable].

[Social Security Act] 42 *United States Code* § 402:

§ 402 Old-age and survivors insurance benefit payments

(a) Old-age insurance benefits. Every individual who —

(1) is a fully insured individual (as defined in section 214 (a) [42 U.S.C. 414 (a)]).

(2) has attained age 62, and

(3) has filed application for old-age insurance benefits ... for the month preceding the month in which he attained retirement age (as defined in section 216 (*l*) [42 U.S.C. 416 (*l*)]),

shall be entitled to an old-age insurance benefit for each month, beginning with ... and ending with...

(b) Wife's insurance benefits. (1) The wife (as defined in section

216 (b) [42 U.S.C. 416 (b)]) ... of an individual entitled to old-age or disability insurance benefits, if such wife... —

(A) has filed application for wife's insurance benefits,

(B) has attained age 62...,

(C) [Inapplicable], and

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of such individual,

shall ... be entitled to a wife's insurance benefit for each month, beginning with ... and ending with ...

(c) Husband's insurance benefits.[Inapplicable]

(d) Child's insurance benefits. [Inapplicable]

(e) Widow's insurance benefits. (1) The widow (as defined in section 216 (c) [42 U.S.C. 416 (c)]) ... of an individual who died a fully insured individual, if such widow ... —

(A) is not married

(B) (i) has attained age 60, or (ii) [Inapplicable].

(C) (i) has filed application for widow's insurance benefits, or was entitled to wife's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which he died, and [I] has attained retirement age (as defined in section 216 (*l*) [42 U.S.C. 416(*l*)]) or (II) is not entitled to benefits under subsection (a) or section 223 [42 U.S.C. 423], or

(ii) [Inapplicable], and

(D) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount ... of such deceased individual,

shall be entitled to a widow's insurance benefit for each month, beginning with ... and ending with ...

[nothing follows]

NO. _____

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October Term, 1990

RICHARD L. MILLER, PATRICIA A. MILLER, and PATRICIA A. LANTZ,

Petitioners,

v.

DONALD RICE, in his official capacity as Secretary of the United States Air Force, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

Petitioner Richard Miller is a retired Air Force Lieutenant Colonel ["LTC"]. Petitioner Patricia Miller is his wife. Petitioner Patricia Lantz is the widow of Major ["MAJ"] Alfred Lantz, who died as a retired Army officer.

MAJ Lantz when the program started in 1972, and LTC Miller in 1981, enrolled in the military retiree Survivor Benefit Plan ["SBP"], 10 U.S.C. § 1447-55. The SBP was a voluntary — but irrevocable — program in which the retiree purchased, and paid the rest of his life for, a survivor annuity payable to his widow for life. MAJ Lantz and LTC Miller each executed written enrollment agreement forms

(entitled "election certificate" or "SBP election") which expressly stated the terms of the SBP program and the amount of the widow's annuity. One agreement form expressly incorporated certain military publications to explain the details of the program when it was new, and numerous similar publications were provided to later retirees such as LTC Miller.

MAJ Lantz, from his enrollment in the SBP until his death, paid all the required premiums to purchase an annuity in the sum of 55% of his retirement pay. Mrs. Lantz worked as a nurse for many years, during which she paid her FICA taxes. She receives a social security old-age pension based on her own earnings; she does *not* receive any social security widow's benefit.

Lieutenant Colonel Miller has paid all of the required SBP premiums since the time of his retirement to purchase an SBP annuity of 55% of his retirement pay. At the time this action was filed he paid more than $230.00 per month to purchase the annuity. Mrs. Miller worked as a school teacher for many years, during which she paid her FICA taxes. When of requisite age, she will receive a social security old-age pension based on her own earnings and payments. If she survives her husband, Mrs. Miller, like Mrs. Lantz, will receive *no* social security widow's benefit.

Though Mrs. Lantz does not receive a social security widow's benefit, the Army applies the "Social Security Offset" to reduce her SBP annuity as though she did receive the widow's benefit. Her annuity is offset for a payment not paid to her. Should Mrs. Miller survive her husband, the same thing will happen to her.

The Social Security Offset is a statutory provision of the SBP which "integrates" the SBP annuity with one specific, defined social security benefit: the social security widow's benefit *attributable to the servicemember's military earnings.* The logic behind the Social Security Offset was described by the military in the bulletins to which MAJ Lantz's SBP agreement referred and in other publications, but was not explained in the text of the enrollment agreement itself. The explanation, consistent with the apparent legislative intent, was that by application of the offset, Congress

prevented a retiree's widow from receiving two payments — the social security widow's benefit and the military retirement — both deriving from the servicemember's pay while he was in the military.

Under the SBP statute one fact is indisputable (and is not at issue in this case): The SBP annuity is *not* to be offset by a widow's own earned social security old-age benefit arising from her own employment. The military applies an offset against Mrs. Lantz on the theory that she would have been "entitled" to the widow's benefit if she had not been a working wife. The offset is calculated on the basis of the amount she would receive if she had not worked, so the military contends it does not offset her own social security and therefore does not violate the statute.

When LTC Miller and MAJ Lantz enrolled in the SBP the military interpreted the statute differently. The "Social Security Offset" was fully explained in official military publications which stated that social security widow's "payments" would be offset, not unpaid "entitlements." These published interpretations of the SBP statute gave assurance to MAJ Lantz and LTC Miller that the Social Security Offset would not punish their working wives, and expressly induced both retirees to purchase the SBP annuity. Both understood, and the statute appeared to provide, what the military clearly explained: that a working wife who survived her retiree husband would be paid her own earned social security old-age pension, *plus* the SBP annuity.

The District Court held that an SBP Social Security Offset for non-payments was contrary to the statute, 10 U.S.C. § 1451 (e)(3). The District Court specifically construed the term "entitled" as it is used in the Social Security Act, 42 U.S.C. § 402 (e), which definition is incorporated by reference in the SBP statute. On the basis of the statutory definition and the legislative history of the SBP, the District Court held that the "plain meaning" of the statute precluded application of the offset to a widow who received her own social security old-age pension but no widow's benefit. In addition, the District Court held that a contract was formed, and was binding on

the government, because the SBP statute provides for voluntary enrollment and payment of premiums by the retiree.

The Court of Appeals reversed. It held the "plain meaning" of the SBP statute to be the opposite of the plain meaning found by the District Court. The Court of Appeals held that the SBP annuity should be offset by the social security benefit to which a widow "would be entitled" if she had not worked, even though she does not receive the payment.

Basis For Federal Jurisdiction

Petitioners claimed jurisdiction in the District Court on the basis of 28 U.S.C. § 1346 (a)(2), asserting a contract claim. The District Court accepted jurisdiction on that basis. The government defendants suggested that jurisdiction was appropriate instead under 28 U.S.C. § 1331.

Federal Constitutional Questions

Petitioners' complaint raised the following constitutional questions, relying on the 5th Amendment deprivation of property clause and the 14th Amendment equal protection clause:

(1) Can the government deprive a widow of a contractual survivor annuity, without any compensation, by offsetting against the annuity payments social security benefits she does not receive?

(2) Can the government effectively deny to certain working wives their own earned social security old-age benefits, solely because their military-retiree husbands purchased a survivor annuity?

Because the District Court ruled in petitioners' favor on other grounds, and the Court of Appeals merely reversed without addressing the allegations of the complaint, there has been no ruling below in regard to these constitutional questions.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS WHICH REQUIRE THE GOVERNMENT TO HONOR ITS CONTRACTS WITH SERVICEMEMBERS.

The District Court expressly found that the SBP enrollment is a contract authorized by statute, binding on the government. The voluntary enrollment in the program and payment of premiums distinguish the SBP from statutory pensions and benefits, such as social security, which may be altered or reduced by the Congress. The Tenth Circuit reversed, supporting the government's right to interpret the program as non-contractual.

This Court has ruled on the specific issue of enforceability against the government of a servicemember insurance contract in regard to a similar military program. The War Risk Insurance Act of 1917 provided disability policies for servicemembers in World War I. Later during stressful economic times, by the Economy Act of 1933, the Congress attempted to deprive participants of the insurance proceeds for which they had paid premiums. This Court disallowed the government's effort to reneg on those contracts. The Court upheld the distinction, made by the District Court in the case at bar, between an employee benefit or gratuity — which does not create contractual rights — and a voluntary agreement like the SBP, which is paid for with the employee's own funds and does create an enforceable contract. *Lynch v. United States,* 292 U.S. 559 (1934). *See also, Pennie v. Reis,* 132 U.S. 464 (1889).

By applying an offset contrary to the SBP annuity agreement, the government has refused to honor its contract. The Tenth Circuit decision conflicts with this Court's previous decisions in that it permits the government to reneg on contracts merely by making an administrative decision that the agreements are not contracts. The Tenth Circuit ruled that since the SBP statute itself would control any contract created by the statute, the meaning of the statute is the primary consideration. Since the court then deferred to the

administrative agency's permissible construction of the statute, the decision effectively permits the administrative agency to avoid contracts by re-interpretation of the statute which created them.

2. THE COURT SHOULD REVIEW AN AGENCY INTERPRETATION OF STATUTE THAT IS CONTRARY TO CONGRESSIONAL INTENT, ESPECIALLY WHERE THE COURT OF APPEALS DECLINED TO CONSIDER THE PERTINENT LEGISLATIVE HISTORY IN UPHOLDING THE AGENCY.

There appears to be no dispute that a court reviewing an agency's construction of statute is obligated to consider congressional intent. The problem which this case illustrates, and which this Court should address, is the ability of an agency and a court to avoid expressions of intent by evading the specific issue.

This Court's guideline is set forth in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

The reason the Court should grant this petition is that the case illustrates the need to expand upon — or compel adherence to — these seemingly straightforward principles for review of an agency's statutory construction. What has occurred below is that the agency and the Tenth Circuit have violated the directive of the *Chevron* decision by avoiding the "precise question at issue."

In its decision, the District Court discerned the intent of Congress by looking to the legislative history on the precise question of whether the Social Security Offset was to be based upon fictional "entitlements" or real payments:

> It cannot be overemphasized that the only *Social Security*

payments which are taken into account in this integration of benefits are the payments to the *widow based on her husband's Social Security earned while he was on active duty in military service.*

H.R. Rep. No. 92-481, 92d Cong., 1st Sess. at 15 [emphasis added by D. Ct. in part, in original in part] *See also* S.R. Rep. No. 92-1089, 92d Cong., 2d Sess. *reprinted in* 1972 U.S. Code Cong. & Admin. News 3288, 3306 (identical language). Appendix p. 34.

The reference to "payments" occurred throughout the legislative history. For example, in the October 1, 1970, report by the Special Subcommittee on Survivor Benefits of the Committee on Armed Services, House of Representatives, under the heading of "Integration with social security benefits" it was stated:

When she reached age 62, the military reitred [sic] portion of her annuity would be reduced by an amount equivalent to the *payments* she received under social security attributable to her husband's military service. ... and at age 62 she would receive her *social security survivor payment* plus an additional amount from the Department of Defense to bring her total annuity based upon military service up to 55 percent of the deceased's retired pay. [emphasis supplied]

* * *

It should be emphasized that the only social security payments which are taken into account here are those payments made to a widow *based on her husband's social security earned while he was on active duty in military service.* There is no reduction in other benefits that may have been earned as a result of her husband's employment in his postretirement years or that the widow may have earned in her own right in private employment. [emphasis in original]

H.A.S.C. No. 91-68, 91st Cong. 2d Sess. at p. 9519.

The administrative agency and the Tenth Circuit disregarded this Court's injunction to follow congressional intent. Their appoach was to avoid the legislative commentary on the precise question. By

looking to the record only on the general principle of integration of benefits, the agency and the reviewing court opened for themselves great leeway in which to impose their own interpretation of the law. They found support for their own interpretation by looking to the broadest general purpose of the offset: to integrate social security with the SBP annuity. In favoring expressions about a misleading part of the general intent rather than the intent on *the precise question,* the agency and the Court of Appeals have overlooked not only the specific comments about working wives, but also the full explanation of the stated purpose of integration: to avoid double payments. This purpose, this expressed intent, was fully realized by the District Court's decision. By refusing to consider the expressions of Congress on the specific, precise issue the Court of Appeals has endorsed a form of statutory interpretation contrary to this Court's command. It has also ratified a pernicious technique by which extra-constitutional administrative agencies usurp a form of power which lies beyond proper judicial review.

3. THIS COURT SHOULD REVIEW AN AGENCY DEFINITION OF A STATUTORY TERM WHICH DISREGARDS THE MEANING EXPRESSED BY CONGRESS IN A SEPARATE STATUTE.

The Social Security Act definition of "entitled" relied on by the District Court would appear to be conclusive, yet it was wholly disregarded by the Court of Appeals. The Tenth Circuit stated the effect of the Social Security Act on the SBP statute by this simplification: "In practical effect, then, an individual who is entitled to both old-age benefits and survivor benefits under Social Security receives only the single greater amount of the two sets of benefits." Appendix, p. 19. While this might well represent a common sense, plain English reading of the word "entitled" taken out of context, it totally disregards the fact that in the Social Security Act Congress has expressly defined the term "entitled" in the context of the SBP. By the statutory definition, a widow cannot be "entitled to both" as the Tenth Circuit has mistakenly concluded. As explained by the District Court, under 42 U.S.C. § 402 (e)(1)(A), (B), (C), and (D), the

> widow is 'entitled' to a widow's benefit only if is she meets four criteria: 1) she is not married; 2) she has attained the age of 60; 3) she has made an application for benefits; and 4) she is not entitled to old age benefits, or is entitled to old age benefits which are less than the widow's benefit she might be qualified for... A widow(er) is not 'entitled' to the widow(er)'s benefit, by the terms of the statute, where his or her old age benefit exceeds the widow(er)'s benefit he or she would receive.
>
> Appendix p. 33 (citations omitted).

The Tenth Circuit made no effort to distinguish or construe this statutory definition. This Court should grant this petition in order to address not only the possible error in construing the SBP statute as a result of that omission, but also to consider the broader question of the deference which must be accorded by a reviewing court to statutory definitions which are referenced in a statute. If a court, or an administrative agency, can reach a desired result merely by disregarding statutory references, then this Court's historical authority in commanding respect for the intent of Congress is seriously diminished.

4. THIS IS A CASE IN WHICH EQUITABLE ESTOPPEL SHOULD BE APPLIED IN A LIMITED MANNER AGAINST THE GOVERNMENT.

This Court has decided numerous cases in which claims of equitable estoppel were asserted against the government. *Lee v. Munroe & Thornton,* 7 Cranch 366 (1813); *INS v. Hibi,* 414 U.S. 5 (1973); *Heckler v. Community Health Services of Crawford County, Inc.,* 467 U.S. 51 (1984); *OPM v. Richmond,* ___ U.S. ___, 110 S. ___ (1990). Those decisions make it clear that, except in some as-yet-undefined extraordinary circumstances, the acts of government agents will not bind the United States in a manner not sanctioned by law.

Petitioners do not contend that this case presents the one set of facts which would justify the imposition of the estoppel doctrine. Rather, this petition should be granted because the case presents facts

by which the Court should delineate a reasonable middle ground on which to apply a limited version of equitable estoppel. Specifically, the Court could continue to hold that the United States should not be bound by its agents' representations or conduct contrary to law. Instead, where two interpretations of a statute are permissible, principles of equitable estoppel should bind a government agency to its first interpretation as against a claimant who relied on that interpretation to his detriment. At the very minimum, the government's published representations of one statutory interpretation should prevent a court from giving deference to a different interpretation later asserted by the agency.

A significant contention of the government throughout these proceedings, and a basis for the decision by the Tenth Circuit, is that an agency is entitled to deference in its interpretation of a statute. However, the agency previously interpreted the SBP statute contrary to its present position, and both MAJ Lantz and LTC Miller relied on that previous interpretation.

The Court should grant this petition to decide whether the courts should decline deference to any statutory interpretation contrary to an earlier one. Even if it should not broadly apply equitable estoppel to bind the government by its representations, this Court should consider whether to hold that because an agency previously took a contrary position, it can no longer claim the benefit of the doubt.

5. THIS CASE INVOLVES IMPORTANT QUESTIONS OF PUBLIC POLICY AND FUNDAMENTAL CONCEPTS OF JUSTICE WHICH AFFECT 118,000 PEOPLE AND $1.2 BILLION.

The amount in issue in this case, applied to all affected people, amounts to more than $1,175,344,652.00 over the life of the program. This figure assumes that only one retiree wife out of every four was a working wife and earned her own social security old age pension, and further assumes that only one half of those working wives earned a pension larger than their social security survivor's benefit. From government figures, it is then likely that more than

118,000 widows and widowers are, or will be, deprived of 40% of their annuities in the same manner as Mrs. Lantz and Mrs. Miller.

[The foregoing figures are from the Department of Defense Office of the Actuary publication RCS No. DDM(A)1375, which is entitled "FY 1988 DOD Statistical Report on the Military Retirement System." The publication reports (at pp. 18 and 235) that on September 30, 1988, there were 836,206 retirees enrolled in the SBP program and the survivors of 113,526 deceased retirees were receiving annuities. The publication further indicates that during FY 1988 there was a surplus in the SBP program — premiums paid in by retirees, compared to annuity payments to survivors by the government — in the sum of $195,722,045.00. In H.R. 92-481 at p. 31 it was estimated that the SBP would generate a *surplus* of $4.6 billion by the year 2001.]

The magnitude of the SBP program is not the only factor of importance in this petition. The societal values implicit in the case can be gleaned from the identities of, and relationship between, the parties. The troops aligned on one side are all the military services of the United States, but on the opposing side are not the military forces of a foreign enemy. Rather, the U.S. military has brought its power to bear against the working widows of its own soldiers, sailors and airmen. The Army, Navy and Air Force are attempting to dishonor promises to their own troops. At issue is the sanctity of contract and the integrity of the United States government.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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September 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 89-8003

RICHARD L. MILLER and PATRICIA A. MILLER, husband and wife; PATRICIA A. LANTZ, and all others similarly situated,

Plaintiffs-Appellees,

v.

JAMES F. McGOVERN, in his official capacity as Secretary of the United States Air Force; et al.,

Defendants-Appellants.

June 29,1990

C.M. Aron (Richard A. Hennig and Patricia L. Simpson of Aron and Hennig, with him on the brief), Laramie, Wyoming, for Plaintiffs-Appellees.

Constance Wynn (John R. Bolton, Assistant Attorney General; Stuart E. Schiffer, Acting Assistant Attorney General; Richard Allen Stacy, United States Attorney; and John F. Cordes, with her on the brief), Department of Justice, Washington, D.C., for Defendants-Appellants.

(Russell H. Putnam, Jr. of The Austin Law Firm, Columbia, South Carolina, for the National Association for Uniformed Services and Society of Military Widows, Amici Curiae.)

Before HOLLOWAY, Chief Judge, McWILLIAMS, Circuit Judge, and BABCOCK, District Judge.*

* Honorable Lewis T. Babcock, United States District Judge for the District of Colorado, sitting by designation.

McWILLIAMS, Circuit Judge.

Richard Miller and his wife, Patricia Miller, and Patricia Lantz, on behalf of themselves and all others similarly situated, brought suit in the United States District Court for the District of Wyoming against Edward Aldridge, then Secretary of the United States Air Force, John Marsh, Secretary of the United States Army, William Ball, III, Secretary of the Navy, Dorcas Hardy as Administrator of the Social Security Administration, Dr. Otis Bowen, Secretary of Health and Human Services, and others, challenging their interpretation and application of 10 U.S.C. § 1451 (e)(3), which statute is a part of the military's Survivor Benefit Plan (SBP), 10 U.S.C. § 1447-55.

Count one of the complaint was for breach of contract. Count two sought declaratory judgment. Count three was denominated as "Violation of Constitutional Right to Uniform Application of the Law." Count four was denominated as "Unconstitutional Taking of Property without Compensation." Jurisdiction was based on the Constitution of the United States and various federal statutes, including 28 U.S.C. § 1346 (a)(2).[1]

On cross-motions for summary judgment the district court granted plaintiffs' motion and denied the defendants' motion. In so doing, the district court recognized that is was granting the plaintffs' motion for summary judgment on a ground which the plainfiffs had not themselves urged in their motion for summary judgment. The defendants now appeal the judgment thus entered.

As indicated, this appeal concerns the meaning of 10 U.S.C. § 1451 (e)(3), which reads as follows:

> (3) An annuity computed under this subsection shall be reduced by the lesser of--

[1] The defendants doubt that the district court had jurisdiction under 28 U.S.C. § 1346 (a)(2), but believe that the district court had jurisdiction under 28 U.S.C. § 1331. *See* Bowen v. Massachusetts, 487 U.S. 879 (1988).

(A) the amount of the survivor benefit, if any, to which the widow or widower or former spouse would be entitled under title II of the Social Security Act (42 U.S.C. § 401 et seq.) based solely upon service by the person concerned as described in section 210 (1)(1) of such Act (42 U.S.C. 410 (1)(1)) and calculated assuming that the person concerned lives to age 65; or

(B) [Inapplicable].

In granting plaintiffs' summary judgment the district court in its order, which now appears as Miller v. Aldridge, 700 F. Supp. 1565, 1570 (D. Wyo. 1988), well described the respective positions of the parties with the following example:

An example might help illustrate the positions of the parties. Assume H[usband] is retiring from the Army and elects to participate in the SBP. His retirement pay is one thousand dollars ($1,000.00) per month. Per the terms of the SBP, H will pay the SBP ten percent (10%) of his retirement pay, or one hundred dollars ($100.00) per month.

H dies and is survived by W[ife], aged 63. W has worked many years, and has contributed to the Social Security system. Consequently, based on her own earnings, W is entitled to two hundred dollars ($200.00) per month in Social Security old age benefits.

If W were to receive Social Security widow's benefits, she would receive one hundred dollars ($100.00) per month. Eighty dollars ($80.00) of this amount would be due to H's military earnings, twenty dollars ($20.00) of this amount would be due to jobs H worked outside the military. However, W is not entitled to receive the widow's benefit as her old-age benefit ($200.00) exceeds the widow's benefit ($100.00) she would otherwise qualify for.

Under the government's reading of § 1451, W would be given four hundered and seventy dollars ($470.00) per month in SBP benefits. The government would calculate this as follows: W

would receive a base SBP monthly annuity in the amount of five hundred and fifty dollars ($550.00), or fifty-five percent (55%) of H's one thousand dollars ($1,000.00) per month retirement pay. From this amount the government would subtract eighty dollars ($80.00), the portion of the widow's benefit attributable to H's military earnings, leaving four hundred and seventy dollars ($470.00). The government argues that under § 1451, it is to make this reduction even though W receives no widow's benefit [because her old-age benefit exceeds the widow's benefit she would otherwise quality for].

Under the plaintiffs' reading of § 1451, because W receives no widow's benefit, no offset would be applied to W's SBP benefit. Thus, in this example, acording to plaintiffs, W would be entitled to five hundred and fifty dollars ($550.00) from the SBP.

Plaintiffs' motion for summary judgment merely stated that there was no genuine issue of material fact as to any of its four claims for relief and that they were entitled to judgement as a matter of law on each claim based on the reasons advanced in their brief in support of the motion. We do not find that brief in the record on appeal. Be that as it may, it would appear from the district court's order granting plaintiffs' motion for summary judgment that plaintiffs did not claim in their motion for summary judgment that they were entitled to summary judgment on a "plain reading" of 10 U.S.C. § 1451(e)(3). Rather, in its published order, the district court noted that the plaintiffs claimed they were entitled to summary judgment under two theories: (1) breach of contract by the government, and (2) the government was subject to equitable estoppel.

The district court in its order granting plaintiffs' motion for summary judgment stated that it "must determine whether it can grant summary judgment relief on a ground that was not raised..." The district court concluded that it could and stated that the district court "can, and hereby does, *sua sponte,* make a motion for summary judgment in favor of the plaintiffs based on the language of the statutory provisions in question." The district court then proceeded to grant the motion on that ground, holding that the

"plain meaning" of 10 U.S.C. § 1451(e)(3) precluded the government from interpreting that statute as it had been doing, i.e., reducing the SBP benefits paid to the surviving spouse of a military retiree by the amount of Social Security survivor benefits based on the military service of the decedent even though the surviving spouse under Social Security law was not entitled to receive Social Security survivor benefits because the surviving spouse was on her own account entitiled to Social Security old-age retirement benefits which exceeded the Social Security survivor benefits to which she was otherwise entitled.

The district court opined that having concluded that the government has not been paying benefits under the military SBP in a "manner consistent with the statutory scheme creating the SBP," it was "tempted to stop at this point." However, the district court elected "not to stop" and went on to hold that the plaintiffs "had a contract with the government for SBP benefits" consistent with its understanding of the plain meaning of 10 U.S.C. § 1451(e)(3). Under such circumstances, the district court did not find it necessary to deal with plaintiffs' estoppel claim. Accordingly, we are not concerned on appeal with the equitable estoppel argument.

We first deal with 10 U.S.C. § 1451 (e)(3). Plaintiffs [sic] argue that the "plain meaning" of that statutory provision is the exact opposite of the "plain meaning" given the statute by the district court. Some background is in order.

Congress created the SBP in 1972 as a mechanism to provide income to the surviving spouses of members of the military service who die after becoming eligible to retire. S. Rep. No. 92-1089, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3288, 3289. The SBP was designed to "build upon the income-maintenance foundation" of benefits provided by Title II of the Social Security Act. S. Rep. No. 92-1089, 92d Cong., 2d. Sess. 29, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3288, 3304. In particular, Congress wanted to fill the gap in Title II Social Security coverage that existed in the case of wives of military retirees who were widowed at too young an age to begin receiving Social

Security survivor benefits. *Id.; see also* H.R. Rep. No. 99-81, 99th Cong., 1st Sess. 250-51, *reprinted in* 1985 U.S. Code Cong. & Admin. News 472, 527.

Under the terms of the SBP, a member of the military who reaches retirement age is automatically a participant in the SBP even though he does not take retirement. As long as the individual remains on active duty, he makes no payment to the program. And if the service member should die, and his widow is under 62 years of age, she will receive a monthly annuity in the amount of 55% of the pay received by the decedent.

When the service member who is eligible for retirement actually retires, he has a choice of whether he will be a participant in the SBP. However, unless he "opts out," he is deemed a participant in the SBP and he then contributes 10% of his retirement pay to the program. When the retired service member dies, his widow, if under 62 years of age, will receive a monthly annuity equal to 55% of the deceased service member's retirement pay.

When the annuitant reaches 62 years of age, or if the annuitant is 62 at the time of the spouse's death, the annuitant is not entitled to a monthly annuity equal to 55% of the deceased service member's retirement pay. Rather, the SBP annuity, i.e., 55% of the pay received by the deceased, is reduced by that portion of the Survivor Benefit under Title II of the Social Security Act to which the annuitant would be entitled on account of the military service of the decedent.[2] This reduction is referred to as the "Social Security offset," and appears as 10 U.S.C. § 1451 (e)(3).[3]

[2] Military personnel accrue credit toward "fully insured" status under Title II in the same manner as do other occupational groups. As a result, military personnel, by virtue of their military service, may become eligible for Title II old age insurance benefits, and their widows and widowers may become eligible for Title II survivor benefits.

[3] In 1985, Congress eliminated the Social Security offset, and now an annuitant who is 62 years of age, or older, receives 35% of decendent's retirement pay. However, the 1985 amendments do not apply to this proceeding.

A military SBP annuitant who is 62 years of age, or over, is conceivably entitled to Title II Social Security benefits.[4] Under the current version of Title II an individual is entitled to old-age benefits if he or she is "fully insured" within the meaning of Title II and has attained the age of 62. Also, under the current version of Title II, the surviving spouse of an individual who is "fully insured" at the time of his death is entitled to survivor benefits.

Under Title II, a person may be entitled to old-age insurance benefits and also to survivor benefits. However, that person is not entitled to the aggregate of both sets of benefits. Instead, the amount of monthly survivor benefits is reduced, but not to less than zero, by the amount of monthly old-age benefits. In practical effect, then, an individual who is entitled to both old-age benefits and survivor benefits under Social Security receives only the single greater amount of the two sets of benefits.

Although the complaint stated that this was to be a class action, no motion for class certification was filed. Accordingly, we are here concerned with the three named individual plaintiffs.

Patricia Lantz is the widow of Major Alfred Lantz. On December 17, 1959, Major Lantz retired from the United States Army. When the SBP was created in 1972, Major Lantz chose to participate in the SBP and, thereafter, paid into the SBP the required percent of his retirement pay until his death on December 23, 1985.

At the time of her husband's death, Patricia Lantz was 68 years old. From 1942 to 1981, Patricia Lantz worked as a registered nurse and for that period of time contributed to the Social Security system. Due to her contributions to Social Security, Ms. Lantz receives $362.00 per month in Social Security old-age benefits. But for the fact that Ms. Lantz receives old-age benefits based on her own work history, she would also receive a Social Security survivor benefit

[4] While individuals become entitled at age 60 to widow's and survivor benefits under Title II, 42 U.S.C. § 402(e)(1) & (f)(1), the statutory integration of SBP annuities with survivor benefits begins (and has alway begun) at age 62. The reason for this discrepancy is not clear.

based on her deceased husband's contribution to the Social Security plan. However, Ms. Lantz is not entitled to receive a Social Security survivor benefit because the old-age benefit which she is receiving as a result of her own work exceeds the survivor benefit, and under the Social Security Act she is not entitled to both.

Since her husband's death, Ms. Lantz has been receiving a monthly annuity from the SBP, in addition to her Social Security old-age benefit, but the annuity from the SBP has been reduced by the Social Security offset, and it is this "offset" which is at issue in her case.[5]

The remaining plaintiffs are Richard and Patricia Miller, husband and wife, who are both living. In 1981, Richard Miller retired from the United States Air Force and upon his retirement he elected to participate in the SBP and has since been making monthly contributions to the SBP. Mrs. Miller is a schoolteacher and is herself "fully insured" under Social Security. Should Richard Miller predecease Patricia Miller, Patricia does not anticipate that she will be entitled to survivor benefits under Social Security because her old-age benefits under Social Security would be greater than the survivor benefits. The Millers are plaintiffs in this action, according to the district court, because "they fear what has happened to Ms. Lantz with regard to Social Security offset will happen to Mrs. Miller" should she outlive her husband. Richard Miller also sought a declaration that he be given the opportunity to opt out of the SBP and receive a refund of contributions previously paid.

[5]A hypothetical may help to put the issue in better focus. If Ms. Lantz did not have a work history of her own which qualified her as "fully insured" under the Social Security Act, she, of course, would not have qualified for old-age insurance benefits, in which event she would have been eligible to receive and would have received the survivor benefit under the Social Security Act, which would include the benefits based on her deceased husband's military employment and any non-military employment. However, under the Social Security offset provision of the military's SBP, that part of the Social Security survivor benefit based on her deceased husband's military employment would be deducted from survivor benefits otherwise payable under the SBP.

The district court in denying a motion to dismiss concluded, *inter alia,* that Richard Miller had standing to sue the defendants because he was a party to a contract, and that Mrs. Miller and Ms. Lantz had standing to sue because they were third party beneficiaries. The district court found subject matter jurisdiction under 28 U.S.C. § 1346 (a)(2).

After stating the "plain meaning" of 10 U.S.C. § 1451 (e)(3), the district court entered judgment for Ms. Lantz in the sum of $4,788.40, said sum representing the underpayment to Ms. Lantz resulting from the Social Security offset which had been applied to her SBP benefit. The district court further ordered that future payments to Ms. Lantz should be "consistent with its opinion," and that should Mrs. Miller outlive her husband, military survivor benefits paid to her should be "in a manner consistent with this opinion." The district court disallowed Richard Miller's claim for refund of his contributions to the SBP.

10 U.S.C. § 1451 (e)(3) provides that the SBP survivor annuity will be reduced at age 62 by:

> [T]he amount of survivor benefit, if any to which the widow or widower or former spouse *would be* entitled under title II of the Social Security Act (42 U.S.C. 401 et seq.) *based solely upon service* by the *person concerned* as described in section 210 (1)(1) of such Act (42 U.S.C. 410 (1)(1)) and calculated assuming the person concerned lives to age 65; . . . (emphasis added).

The critical language in the statute is "would be entitled" and "based solely upon the service by [the deceased spouse]." Under Title II of the Social Security Act, a person is not ordinarily entitled to survivor benefits if the person's own old-age benefits exceed the amount of the survivor benefits. However, solely for the purpose of determining the amount of the offset, the statute mandates that the amount be determined by looking to the Social Security survivor benefit that "would be" payable to the surviving spouse based on the military service of the decedent. The statute says that the SBP

annuity shall be reduced by the amount of the Social Security survivor benefit to which the spouse "would be entitled" resulting from the military service of the decedent. "Would be entitled" is not the equivalent of "is entitled" and the former is sufficiently broad to include the situation where a person would otherwise be entitled to a Title II survivor benefit but because of the triggering of another statutory provision will not actually be eligible to receive, nor will he, or she, actually receive payment of the benefit. The Social Security offset is concerned with how the offset will be calculated, not the actual entitlement for Title II survivor benefits.

We believe the meaning which we find in 10 U.S.C. § 1451 (e)(3) is consistent with legislative history. The Senate Report prepared by the Armed Services Committee, under the heading of "Rationale for Including Social Security Offset in Survivors Benefit Plan," states that "the proposed survivor benefit program is designed to build upon the income-maintenance foundation of the social security system. Thus, the benefits are integrated with social security benefits." S. Rep. No. 92-1089, 92 Cong., 2nd Sess. 29, *reprinted in* 1972 U.S. Code Cong. and Admin. News 3288, 3304. The Senate Committee then illustrated the actual effect of the offset provision to an SBP beneficiary, stating that "when a widow reaches age 62, her [SBP] annuity based on her husband's military retirment pay would be offset by the equivalent of the Social Security payment which is *attributable to her husband's military service.*

The defendants argue, alternatively, that if the interpretation they have given 10 U.S.C. § 1451 (e)(3) is not mandated by the "plain meaning" of that statute, their interpretation is nonetheless a "permissible" interpretation and should be afforded substantial deference by a reviewing court. Although we believe that the defendants' interpretation follows the "plain meaning" of the statute, certainly it is, at a minimum, a "permissible one" under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In that case, the Supreme Court at pp. 842-44 spoke as follows:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implictly or explicitly, by Congress." *Morton v. Ruiz,* 415 U.S. 199, 231, 94 S. Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the admistrator of an agency.

As indicated, the district court also held that plaintiffs had a "contract" with the government. In the district court, the plaintiffs suggested that the "terms" of the "contract" were set forth in various government pamphlets and brochures describing the SBP, and that the government should be held to those terms. The district judge rejected that suggestion and held that the "terms" of the "contract" were the statutes and, in particular, the meaning which he found in 10 U.S.C. § 1451 (e)(3). In other words, the government's failure to

apply 10 U.S.C. § 1451(e)(3) in accord with the district court's reading of the statute was itself a breach of contract. Having now held that the meaning which the district court gave 10 U.S.C. § 1451 (e)(3) is erroneous, any "contract" which plaintiffs conceivably had with the government would now be subject to the meaning we have given that statute. All of which is, of course, no comfort to the plaintiffs. Accordingly, we need not determine here whether there was a "contract," in the strict legal sense, with the government.

Defendants concede that Ms. Lantz has standing to maintain the present action, but argued in the district court, and here, that the Millers do not. In view of our reading of 10 U.S.C. § 1451(e)(3), we deem it unnecessary to explore this matter.

Judgment reversed.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C87-0253-B
November 9, 1988

RICHARD L. MILLER and PATRICIA A. MILLER, husband and wife; PATRICIA A. LANTZ: and all others similarly situated,

Plaintiffs,

v.

EDWARD C. ALDRIDGE, JR., in his official capacity as Secretary of the United States Air Force; JOHN O. MARSH, JR., in his official capacity as Secretary of the United States Army; JAMES WEBB, in his official capacity as Secretary of the United States Navy; DORCAS R. HARDY, in her official capacity as Administrator of the Social Security Administration; ELIZABETH DOLE, in her official capacity as Secretary of Transportation; CASPAR WEINBERGER, in his official capacity as Secretary of Defense; OTIS R. BOWEN, in his official capacity as Secretary of Health and Human Services; DEPARTMENT OF THE ARMY; DEPARTMENT OF THE NAVY; DEPARTMENT OF THE AIR FORCE; DEPARTMENT OF TRANSPORTATION; and DEPARTMENT OF HEALTH AND HUMAN SERVICES.

Defendants.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on cross-motions for summary judgment. The motions have duly come on for hearing before the Court and have been argued and submitted for decision. The Court, having considered the pleadings on file herein, and the briefs and affidavits in support of and opposition to the motions, and the oral arguments of counsel, and being fully advised in the premises, FINDS and ORDERS as follows:

Factual Background

In 1972 Congress created the Survivor Benefit Plan, ("SBP"), to provide income to the surviving spouses of military servicemembers who die after becoming eligible to retire. The SBP was codified at 10 U.S.C.A. § § 1447 to 1455 (1983 & Supp. 1988).

Upon reaching retirement age, a servicemember automatically becomes a participant in the SBP. This is true whether or not the servicemember actually retires. If, an active duty, retirement age servicemember dies leaving a widowed spouse under age 62, the widowed spouse will, under the SBP, receive a monthly annuity in an amount equal to fifty-five percent (55%) of the pay the deceased servicemember would have received during retirement. This benefit is conferred even though the active duty, retirement age servicemember pays nothing to receive the benefits of the SBP.

At the point in time a retirement age servicemember elects to actually retire he or she is given the choice of whether or not to remain in the SBP. The choice the servicemember has is to do nothing and automatically become enrolled in the SBP, or to "opt out" of the program by filling out a form. If a retiring servicemember elects to remain in the SBP, such election is irrevocable. Once in the program, the servicemember contributes ten percent (10%) of his or her retirement pay to the program. After enrolling in the SBP, should the retiree die leaving a widowed spouse under the age of 62, the surviving spouse will receive an annuity equal to fifty-five percent

(55%) of the deceased servicemember's retirement pay.

If a widowed spouse is eligible for SBP benefits when he or she is aged 62 or older, he or she is not automatically eligible to receive the fifty-five percent (55%) annuity. Instead, the annuity is reduced by, for the purposes of this case, "an amount equal to the amount of the survivor benefit, if any, to which the widow or widower would be entitled under Title II of the Social Security Act (42 U.S.C. 401 et seq.) based solely upon service by the [deceased military retiree]...." 10 U.S.C.A. § 1451(e)(3) (Supp. 1988). While this reduction provision has been amended in recent years, the plaintiffs in this case, by the terms of the amended statute, are subject to the statutory language described above. This is true because the plaintiffs became participants, potential beneficiaries, or actual beneficiaries of the SBP on or before October 1, 1985. *See* 10 U.S.C.A. § 1451(e) (Supp. 1988). The reduction to SBP annuity benefits described above has become known as the Social Security offset. When the government should apply the Social Security offset is the central dispute in this case.

The above facts are common to all three of the plaintiffs. I will now discuss the undisputed facts as they pertain to the individual plaintiffs.

a. Plaintiff Patricia A. Lantz.

Plaintiff Patricia A. Lantz is the widowed spouse of Major Alfred C. Lantz. On December 17, 1959, Major Lantz retired from the United States Army after 20 years of service. When the SBP was created in 1972, Major Lantz was given the option of participating in the plan, even though he had retired some years earlier. Major Lantz chose to participate in the SBP. Consequently, Major Lantz paid into the SBP the required portions of his retirement pay, up until his death on December 23, 1985. At the time of Major Lantz's death, plaintiff Patricia Lantz, Major Lantz's beneficiary under the SBP, was 68 years old.

Plaintiff Lantz was, from 1942 to 1981, a member of the work force, earning wages as a registered nurse. Over the years that she

worked, Ms. Lantz earned in excess of one hundred and twenty-six thousand dollars ($126,000). These earnings were subject to withholdings for the benefit of the Social Security system. Due to her contributions to the Social Security system, Ms. Lantz receives three hundred sixty-two dollars ($362.00) per month in Social Security old age benefits. But for the fact of Ms. Lantz's entitlement to Social Security benefits based on her own work history, she could receive Social Security benefits based on her husband's military and non-military Social Security earnings, the so called "widow's benefit," or, as it is called in § 1451, the "survivor benefit." *See* 42 U.S.C.A. § 402(e)(1)(d) (1983 & Supp. 1988). However, plaintiff Lantz is not entitled, as the word is defined in the statute, to a widow's benefit because the old age benefit that she is entitled to as a result of her own work history, exceeds the widow's benefit she would receive. See 42 U.S.C.A. § 402 (e)(1)(d) (1983 & Supp. 1988).

When Major Lantz died, plaintiff Lantz became eligible for annuity payments under the SBP. While it is true Ms. Lantz has been receiving payments from the SBP, the payments have been reduced by the Social Security offset. Ms. Lantz contends that the Social Security offset being made against her SBP payments is wrong for the following reason: The government has been reducing Ms. Lantz's SBP payment by an amount equal to the widow's benefit attributable to Major Lantz' military earnings, even though Ms. Lantz is not actually receiving a widow's benefit, and is indeed, not entitled to such benefit.

In reducing Ms. Lantz's SBP payment, the government takes the position that the language of § 1451 requires the offset be made, even though Ms. Lantz is receiving no Social Security benefit based on her husband's military earnings. Since Ms. Lantz began receiving SBP benefits, those benefits have been offset by the government in the amount of four thousand seven hundred and eighty-eight dollars and forty cents ($4,788.40).

b. Plaintiffs Richard L. and Patricia A. Miller

Plaintiffs Richard L. and Patricia A. Miller are husband and wife.

Richard Miller began a career in the United States Air Force on June 5, 1958. In 1981 Richard Miller retired from the Air Force at the rank of Lieutenant Colonel. Upon his retirement, Lt. Col. Miller elected to participate in the SBP. Currently Lt. Col. Miller pays two hundred and thirty-two dollars and thirty-four cents ($232.34) per month in contributions to the SBP.

Ms. Miller has, for fourteen (14) years, been a school teacher, earning wages and contributing to the Social Security system. Should Lt. Col. Miller predecease her, Ms. Miller is not expected to be entitled to widow's benefits from Social Security. This is true because Ms. Miller's anticipated Social Security old age benefit, based on her own earnings, will be greater than the amount she is expected to qualify for under the widow's benefit provisions of the Social Security Act. The Millers are plaintiffs in this action because, in short, they fear what has happened to Ms. Lantz with regard to the Social Security offset will happen to Ms. Miller in the event Lt. Col. Miller predeceases her.

Relief Sought

Plaintiffs seek the following relief: 1) A declaration from the Court that Ms. Lantz's SBP payment not be reduced by the Social Security offset. Similarly, Ms. Miller seeks a declaration that should she become eligible for SBP benefits and for old age Social Security benefits based on her own employment, that her SBP annuity not be reduced by the Social Security offset; 2) a judgment in favor of Ms. Lantz for the amounts offset against the SBP payment she has already received; 3) a judgment in favor of Lt. Col. Miller in an amount corresponding to the reduction in SBP benefits Ms. Miller could expect due to the Social Security offset should Ms. Miller become eligible for SBP benefits; 4) an order allowing Lt. Col. Miller to withdraw from the SBP should he choose to do so; and, 5) costs and attorney fees.

As far as their summary judgment motion is concerned, plaintiffs claim they are entitled to the above relief under two theories. First, plaintiffs claim that the application of the Social Security offset, when the surviving spouse is entitled to Social Security benefits

based on his or her own earnings, is a breach of a contract the retiring servicemembers allegedly made with the government when they elected to participate in the SBP. In connection with this claim, plaintiffs Patricia Lantz and Patricia A. Miller contend they are third-party beneficiaries of the contracts allegedly entered into by their respective husbands. Second, the plaintiffs claim that the government should be equitably estopped from deducting the Social Security offset from the SBP benefit in situations where the surviving spouse is entitled to Social Security benefits based on his or her own Social Security earnings. Plaintiffs base their estoppel argument on certain representations made to the retiring servicemembers when they chose to participate in the SBP.

Defendants also claim they are entitled to summary judgment. Defendants contend they are entitled to summary judgment because the plaintiffs may not, on the undisputed facts, maintain their contract or estoppel claims. Defendants also claim the plain language of the statute in question, 10 U.S.C.A. § 1451 (1983 & Supp. 1988), requires the government to reduce SBP benefits in the manner in which the government has been applying the offset.

Discussion

The Statutes

The Court, after a careful reading of the statutory scheme involved in this case, concludes that the Social Security offset should not be made against SBP benefits when the beneficiary is receiving Social Security old age payments based on his or her own, not their deceased servicemember's, earnings. The Court reaches this conclusion based on the plain language and defined language of the statutes involved. Since the plaintiffs did not request summary judgment relief based on a reading of the statutes, the Court must determine whether or not it can grant summary judgment relief on a ground that was not raised; that is, the Court must ask whether it has the power to raise this issue *sua sponte.*

"'[D]istrict courts are widely acknowledged to posses the power to enter summary judgments, *sua sponte,* so long as the losing party

was on notice that she had to come forward with all her evidence.'" *Graham v. City of Oklahoma City,* 859 F.2d 142 (10th Cir. 1988), (quoting *Celotex v. Catrett,* 477 U.S. 317, 326 (1988)). In light of this language, the Court must ask whether the losing parties, the defendants in this case, came forward with all of their evidence.

Because this matter is before the Court on cross-motions for summary judgment, the Court concludes that all of the evidence in this case is before the Court. The Tenth Circuit has stated that where cross-motions for summary judgment have been filed, an inference is raised "that there is no evidence other than the pleadings and supporting instruments to be considered, and so the trial court need only examine those materials in ascertaining whether an issue of material fact exists." *Securities and Exchange Comm. v. American Commodity Exchange, Inc.,* 546 F.2d 1361, 1366 (10th Cir. 1976). The parties have given the Court no reason to believe that the facts are in dispute or are not as they appear in the record currently before the Court. Consequently, the Court concludes that all of the facts pertinent to this case are currently in the record. Therefore, the Court can, and hereby does, *sua sponte,* make a motion for summary judgment in favor of the plaintiffs based on the language of the statutory provisions in question.

a. The Statutory Scheme - The Parties' Positions. The starting point of the statutory analysis is the offset statute, wherein it is stated that "[w]hen the widow or widower reaches age 62, . . . the monthly annuity shall be reduced by . . . an amount equal to the amount of the survivor benefit, if any, to which the widow or widower would be entitled under Title II of the Social Security Act (42 U.S.C. 401 et seq.) based solely upon service by the person concerned as described in section 210 (1)(1) of such Act (42 U.S.C. 410 (1)(1). . . ." 10 U.S.C.A. § 1451 (3) (1983); *see also* 10 U.S.C.A. § 1451 (e)(3) (Supp. 1988). This provision, in particular the words "would be entitled to" is a main point of contention between the parties.

The Court can see at least two ways to read this provision. The first is the way suggested by the government. The government contends that the provision requires SBP benefits to be offset in all

instances, including those where the SBP beneficiary is receiving no Social Security widow(er)'s benefit. The government contends that the offset should always be equal to the Social Security widow(er)'s benefit attributable to the deceased servicemember's military pay, regardless of whether the widowed spouse is actually entitled to receive this amount.

The second way the Court can read this provision is the way suggested by the plaintiffs. That is, if the widowed spouse is entitled to Social Security widow(er)'s benefits, then and only then will the amount of the SBP payment be reduced by an amount equal to the Social Security widow(er)'s benefit which is attributable to the deceased spouse's military earnings.

An example might help illustrate the positions of the parties. Assume H is retiring from the Army and elects to participate in the SBP. H's retirement pay is one thousand dollars ($1,000.00) per month. Per the terms of the SBP, H will pay the SBP ten percent (10%) of his retirement pay, or one hundred dollars ($100.00) per month.

H dies and is survived by W, aged 63. W has worked many years, and has contributed to the Social Security system. Consequently, based on her own earnings, W is entitled to two hundred dollars ($200.00) per month in Social Security old age benefits.

If W were to receive Social Security widow's benefits, she would receive one hundred dollars ($100.00) per month. Eighty dollars ($80.00) of this amount would be due to H's military earnings, twenty dollars ($20.00) of this amount would be due to jobs H worked outside the military. However, W is not entitled to receive the widow's benefit as her old age benefit ($200.00) exceeds the widow's benefit ($100.00) she would otherwise qualify for.

Under the government's reading of § 1451, W would be given four hundred and seventy dollars ($470.00) per month in SBP benefits. The government would calculate this as follows: W would receive a base SBP monthly annuity in the amount of five hundred and fifty dollars ($550.00), or fifty-five percent (55%) of H's one

thousand dollars ($1,000.00) per month retirement pay. From this amount the government would subtract eighty dollars ($80.00), the portion of the widow's benefit attributable to H's military earnings, leaving four hundred and seventy dollars ($470.00). The government argues that under § 1451, it is to make this reduction even though W receives no widow's benefit.

Under the plaintiffs' reading of § 1451, because W receives no widow's benefit, no offset would be applied to W's SBP benefit. Thus, in this example, according to plaintiffs, W would be entitled to five hundred and fifty dollars ($550.00) from the SBP.

b. The Statutory Language

The word "entitled", as used in § 1451, is defined in the Social Security Act which is expressly referred to in the text of § 1451. Under 42 U.S.C.A. § 402 (e) (1983), and the amended version at 42 U.S.C.A. § 402 (e) (Supp. 1988), a widow is "entitled" to a widow's benefit only if she meets four criteria: 1) she is not married; 2) she has attained the age of 60; 3) she has made an application for benefits; and 4) she is not entitled to old age benefits, or is entitled to old age benefits which are less than the widow's benefit she might be qualified for. *See* 42 U.S.C.A. § 402 (e)(1)(A), (B), (C), and (D) (1983 & Supp. 1988). The same rules apply to widowers. *See* 42 U.S.C.A. § 402 (f)(1)(A), (B), (C), and (D) (1983 & Supp. 1988).

In examining § 1451 then, the offset should not be applied to SBP payments unless the surviving spouse is "entitled" to widow(er)'s benefits. A widow(er) is not "entitled" to the widow(er)'s benefit, by the terms of the statute, where his or her old age benefit exceeds the widow(er)'s benefit he or she would receive. *See* 42 U.S.C.A. § 402 (e)(1)(D) (1983 & Supp. 1988). This construction of the statute is consistent with plaintiffs' reading.

Applying this analysis to the facts in the present case, the Court concludes that the government has been incorrectly applying the Social Security offset to plaintiff Lantz's SBP payments. Ms. Lantz is "entitled" to nothing from the Social Security system based on her deceased husband's military earnings as she is receiving old age

benefits based solely on her own earnings. *See* 42 U.S.C.A. § 402 (e)(1)(D) (1983 & Supp. 1988). Since Ms. Lantz is not "entitled" to a widow's benefit based on her husband's military earnings, or otherwise, § 1451 does not require an offset.

The Court is satisfied that this reading of the statutes in question is not only consistent with the plain language and defined terms of the statutes, but that this reading is consistent with the intent of Congress when it established the SBP. The following excerpt from the House Committee on Armed Service's report on the SBP, is particularly telling:

> Section [1451] provides, therefore, that when the widow reaches age 62, or when there are no dependent children, whichever occurs later, the monthly annuity paid under the Survivor Benefit Plan shall be reduced by an amount equal to the amount of Social Security survivor benefit, if any, to which the widow is entitled based solely upon the active military service of the retiree . . .
>
> In other words, when the widow reaches age 62, her annuity based on her husband's military retired pay would be offset by the equivalent of the *Social Security payment* which is *attributable to her husband's military service.*

H.R. Rep. No. 92-481, 92d Cong., 1st Sess. 14 (emphasis added in part, in original in part). In the same report it is stated:

> There is no reduction in the Social Security benefits that may have been earned as the result of the husband's employment in his post-retirement years or any amount above the amount of the survivor benefit flowing from her husband's military service that the widow may have earned in her own right in private employment. It cannot be overemphasized that the only *Social Security payments* which are taken into account in this integration of benefits are the payments to the *widow based on her husband's Social Security earned while he was on active duty in military service.*

Id. at 15 (emphasis added in part, in original in part). *See also* S.R. Rep. No. 92-1089, 92d Cong., 2d Sess., *reprinted in* 1972, U.S. Code Cong. & Admin. News 3288, 3306 (identical language).

The above excerpts from the applicable legislative history clearly indicate that Congress only intended to reduce SBP payments when the widowed spouse receives Social Security *payments* based on the deceased servicemember's military earnings. The legislative history does not indicate that the offset is to be made in situations where the surviving spouse is receiving Social Security benefits based on his or her own earnings. In the present case, Ms. Lantz is receiving no benefits under the Social Security system based on her deceased husband's military earnings. The Social Security benefits Ms. Lantz receives are based solely on her own earnings history. Therefore, the Court concludes that the government has been incorrectly applying the Social Security offset to Ms. Lantz's SBP payments. Consequently, Ms. Lantz is entitled to an award equal to the amount of the Social Security offset that has been made against her SBP payments. In her affidavit, Ms. Lantz establishes, that her SBP payments have been offset in the amount of four thousand seven hundred and eighty-eighty dollars and forty cents ($4,788.40). This amount has not been disuputed by the defendants, therefore, judgment will be entered in favor of Ms. Lantz and against defendants for this amount.

Defendants will also be ordered to make future SBP payments to Ms. Lantz in a manner consistent with the statutory scheme as interpreted in this order. This portion of the order will apply to payments made to Ms. Lantz after and including October, 1988, the first month after the last month covered by her affidavit. Payments under this order shall continue until such time as Ms. Lantz is no longer entitled to SBP payments.

It will also be ordered that should plaintiff Patricia A. Miller become eligible for payments under the SBP while the above described statutory scheme remains in effect, that such payments be made to her in a manner consistent with the statutes as interpreted in this order.

Contractual Protection

The Court is tempted to stop at this point. By finding the government has not been paying SBP benefits in a mannner consistent with statutory scheme creating the SBP, and by ordering the above relief, the Court has given the plaintiffs nearly all of the relief they seek in this lawsuit. However, by resting solely on the statutory grounds, the Court leaves the plaintiffs open to possible amendments to the statute that would alter the payment scheme described above. This brings the Court to the plaintiffs' argument that they are somehow contractually entitled to SBP payments. If the plaintiffs are correct, then their SBP benefits may be entitled to more protection than merely relying on the statutory language would provide. Therefore, the Court feels compelled to examine the plaintiffs' argument that they have a contract with the government for the SBP benefits.

The Court begins by noting that there is no federal case or statutory law that addresses the issue of whether a contract is created between the government and plan participants in a situation such as this, where participants pay for the privilege of participating in the plan. The defendants cite many cases that stand for the proposition that most government employees do not have contract rights in their employment. *See e.g., Kizas v. Webster,*707 F.2d 524 (D.C. Cir. 1983) where the Court of Appeals stated that federal workers' right to pay "'must be determined by reference to the statutes and regulations governing [compensation], rather than to ordinary contract principles.'" *Id.* at 535 (footnotes omitted). The defendants have also cited cases holding that contract principles are inapplicable to Social Security benefits and to military pay. *See Bell v. United States,* 366 U.S. 393, 401 (1961) ("[C]ommon-law rules governing private contracts have no place in the area of military pay."); *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 569, 610 (1960) (a contributing worker's interest in the Social Security system described as "noncontractual").

The cases cited by defendants do not take into account certain realities of the SBP. The SBP is not like government employment, it

is not like military pay, and it is not like Social Security. The SBP is a voluntary program that the participants elect to take part in. In addition to being voluntary, the SBP requires the participants to pay for the opportunity to collect on the benefits offered by the SBP.

The defendants argue that the SBP is most like the Social Security system and that cases like *United Steelworkers, supra,* holding that the Social Security system does not create contract rights in its beneficiaries, should apply. The Court does not agree with the defendants' analogy. Again, the SBP is a voluntary system where the plan participants elect to pay money in return for certain benefits. The Social Security system is not voluntary. The payments made into the Social Security system by workers are not made after the exercise of a choice by the worker. Social Security payments are indeed, as the Supreme Court has stated, more akin to a tax. *See United Steelworkers, supra,* 363 U.S. at 609. Therefore, the Court concludes that the SBP is not like the Social Security system.

The defendants argue that the SBP is not voluntary because a retiring servicemember is automatically enrolled in the program upon reaching retirement age, and must "opt out" of the plan if he or she does not wish to participate. The distinction between "opting in" and "opting out" of a program is lost on the Court. The only difference between an "opt in" and "opt out" program is that the participant voluntarily participates in the program by *action* in the former case, and *inaction* in the latter.

The Court's determination that the SBP is a voluntary program is consistent with the decision of the Indiana Supreme Court in *Board of Trustees of the Public Employees' Retirement Fund v. Hill,* 472 N.E.2d 204, 208 (Ind. 1985). In *Board of Trustees,* the Indiana Supreme Court dealt with many of the same questions that the Court faces in this case. *Board of Trustees* involved a government employee retirement plan that was quite similar to the SBP; enrollment in the plan was automatic; however, the participant could "opt out" of the plan if he or she desired to do so. Once in the Indiana plan, the participants were required to contribute a portion

of their earnings to the plan. In holding that the "opt out" plan was indeed voluntary, the court stated: "Entry of an employee into a retirement plan offered by an employer is truly voluntary for these purposes when the employee can elect not to participate without detrimental consequences to the relationship." *Board of Trustees, supra,* 472 N.E.2d at 208.

The question remains whether servicemembers who elect to participate in the SBP and pay money into the program, have a contract with the government. The Court concludes that they do. In the case of the plaintiffs here, there was an offer from the government to participate in the SBP, the offer was accepted when the servicemembers in question elected to sign up for or to stay in the SBP, finally the servicemembers in question gave consideration for the government's promise to pay benefits under the SBP when they made cash payments to the program via withdrawals from their retirement pay. In concluding that there is a contract between the plaintiffs and the government, the Court's holding is consistent with state decisions that have concluded that a contract or annuity is created when government employees sign up for programs like the SBP. *See Board of Trustees, supra,* 472 N.E.2d at 208 and cases cited therein.

The Court recognizes that there are servicemembers of retirement age who remain in the active service, and that these individuals are in the SBP and are not required to pay into the plan. This decision does not involve these individuals. This decision only involves these plaintiffs who are, or are beneficiaries of, or potential beneficiaries of, servicemembers who have voluntarily paid for the opportunity of receiving benefits under the plan. Maj. Lantz and Lt. Col. Miller made the decision to take a portion of their retirement pay and give it to the government so that the government will pay their survivors certain benefits should the servicemember predecease them. The expectations of these people are deserving of some level of protection. The Court feels that this protection must be in the form of a contract that was created when these servicemembers agreed to participate in the SBP.

Having concluded that a contract was created between the servicemember and the government, the question becomes: What are the terms of the agreement? The plaintiffs have submitted various government pamphlets and information materials that describe the SBP. These documents were given to the servicemembers in question when they signed up for the program. The plaintiffs now contend that these materials should provide the terms of the plan. The Court does not agree. The terms of the contract are the statutes that define the SBP. These statutes have been discussed at length above and need not be discussed here.

Having concluded that a contract was created, and having determined what the terms of the contrct are, the Court must now determine whether the plaintiffs here have the power to enforce the contract. Certainly Lt. Col. Miller, as the individual who elected to participate in the SBP is a party to the contract and can sue to enforce it. Because Lt. Col. Miller's contract was intended to benefit his wife, it is clear that plaintiff Patricia A. Miller was an intended beneficiary of the contract. Therefore, she is a third-party beneficiary of the contract and may sue for enforcement. *See Northern Nat. Gas Co. v. Grounds,* 666 F.2d 1279 (10th Cir. 1981). Similarly, the contract entered into by Maj. Lantz was intended to benefit his wife, plaintiff Patricia A. Lantz. She, too, is a third-party beneficiary with standing to sue on this contract. *See Id.*

Before the Court enters its judgment and order, the Court notes that Lt. Col. Miller seeks a return of the money he has paid into the SBP. The Court concludes that such a return would not be an appropriate remedy in this case. When Lt. Col. Miller signed up for the SBP, he was essentially taking a risk that he would predecease Ms. Miller, thereby entitling her to benefits under the plan. If the Court ordered a return of Lt. Col. Miller's funds, the Court would be upsetting the balance of risks undertaken by Lt. Col. Miller and the government when they entered into their SBP relationship.

Therefore, for the reasons stated above, it is

ORDERED that judgment be entered in favor of the plaintiff Patricia A. Lantz in the amount of four thousand seven hundred and eighty-eight dollars and forty cents ($4,788.40). It is further

ORDERED that the defendants pay plaintiff Patricia A. Lantz any SBP payments to which she is entitled, in a manner consistent with this opinion. It is further

ORDERED that should plaintiff Patricia A. Miller become eligible for SBP payments, that such payments be made in a manner consistent with this opinion.

Dated this 9th day of November, 1988.

/s/ Clarence A. Brimmer

CHIEF JUDGE
UNITED STATES DISTRICT COURT